92-161

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

VINCENT JAMES LANDANO,

Cross-Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Cross-Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is a cognizable public interest, for purposes of Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552 (b)(7)(C), where (a) a plaintiff has demonstrated a nexus between FBI activity and the activity of state agencies that have engaged in unlawful activity and (b) the plaintiff wishes to learn through his FOIA request whether or not and to what extent the FBI has participated in the State wrongdoing.

PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the United States Department of Justice and the Federal Bureau of Investigation. Respondent, the plaintiff below, is Vincent James Landano.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 2
STATEMENT 2
REASONS FOR GRANTING THE CROSS-PETITION .. 4
CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES:

Dep't of the Air Force v. Rose, 425 U.S. 352 (1976) 5

Landano v. Rafferty, 126 F.R.D. 627 (D.N.J. 1989), rev'd 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990) 1, 3

Landano v. Rafferty, 670 F.Supp. 570 (D.N.J. 1987) aff'd 856 F.2d 569 (3d Cir. 1988), cert. denied 489 U.S. 1014 (1989) 1, 2

United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) 4

STATUTES:

5 U.S.C. § 552 2

5 U.S.C. § 552(b)(7)(C) 1

28 U.S.C. § 1254(1) 1

The respondent, Vincent James Landano, hereby cross-petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Third Circuit that reversed the judgment of the district court with regard to FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).

OPINIONS BELOW

The opinion of the Court of Appeals (App.[1], 1a-30a) is reported at 956 F.2d 422. The opinions of the district court (App., 31a-47a and 48a-61a) are reported at 751 F.Supp. 502 and 758 F.Supp. 1021. Opinions in a related habeas corpus action appear as *Landano v. Rafferty*, 670 F.Supp. 570 (D.N.J. 1987) aff'd 856 F.2d 569 (3d Cir. 1988), cert. denied 489 U.S. 1014 (1989) and *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990).

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. App., 62a-63a. The Petition for certiorari was received by the respondent on June 24, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] Unless otherwise indicated, all citations are to the Appendix annexed to the Petition by the FBI.

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. § 552 provides in pertinent part:

> (b) This section does not apply to matters that are
>
> * * *
>
> (7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> * * *
>
> (C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy.

STATEMENT

1. It is uncontroverted in the record below that there was a nexus between the FBI, on the one hand, and state prosecutive and investigative authorities who engaged in improper, unconstitutional conduct during the criminal investigation and prosecution of Mr. Landano. (App., 58a and 60a)

2. The FBI was an active participant in a team of federal, state and local prosecutors and investigators that interviewed eyewitnesses and collected and analyzed physical evidence. (Respondent's Supplemental Appendix below at SA5-SA16; *see also,* App. 2a)

3. In *Landano v. Rafferty,* 670 F.Supp. 570 (D.N.J. 1987), aff'd 856 F.2d 569 (3d Cir. 1988), cert. denied, 489

U.S. 1014 (1989) ["*Landano I*"] and *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990) ["*Landano II*"], the district court made factual findings, adopted by the district court in its FOIA decision below (App. 58a), detailing gross, unconstitutional misconduct by investigators and prosecutors in this case. The *Landano I* and *II* district court found that the government, in bad faith, suppressed exculpatory eyewitness evidence, knowingly concealed the coercion of a key witness, and impermissibly coached another witness.

4. The district court below found as fact that there existed "an investigative relationship between the ultimate prosecution of this matter and the FBI." (App. 58a)

5. The district court determined, for purposes of Exemption 7(C), that the public had a right to know, via FOIA, whether and to what extent the FBI participated in what the district court characterized as the "tainted coordinated activity" (App., 60a) of the federal/state/local team that investigated and prosecuted the case against Mr. Landano.

6. The Third Circuit, in its factual recitation, accurately states "the FBI was involved, as were New Jersey state law enforcement officials, in the investigation of the murder." (App., 2a)

7. Notwithstanding the uncontroverted factual findings of the district court concerning the nexus between the FBI and the "tainted activity" of the investigative/prosecutive team, the Third Circuit, without disturbing those factual findings, held that this case presented no cognizable public interest for purposes of 7(C) to be

balanced against privacy interests. In so ruling, the Circuit Court adopted a *per se* rule that where State wrongdoing is involved, there can be no 7(C)-cognizable public interest, ignoring the issue posed by the *nexus* between the FBI and the tainted state activity:

> Landano here paints with too broad a brush. Landano was convicted of murder in a state court. No federal prosecution ever took place in this case. Accordingly, any Brady-type wrongdoing must necessarily have involved the state prosecutors, not the FBI or federal prosecutors. To the contrary, the district court expressly found that there was no reason to believe there was any FBI wrongdoing involved in this case. Accordingly, we conclude that just as there is no FOIA-recognized public interest in discovering evidence in federal government files of a private party's violation of the law, see *Reporters Comm.*, 489 U.S. at 774, 109 S.Ct. at 1482, there is no FOIA-recognized public interest in discovering wrongdoing by a state agency.

(App., 16a)

REASONS FOR GRANTING THE CROSS-PETITION

The Third Circuit's ruling, which appears to be the first and only reported decision wherein there is an uncontroverted nexus between the FBI and state agencies engaged in misconduct, runs afoul of the holding of this Court in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). There, this

Court held that there is no FOIA-cognizable public interest, for purposes of Exemption 7(C), in discovering evidence in FBI files of criminal activities by private persons, because such evidence would shed no light on federal agency conduct. The Circuit mistakenly deduced from that principle that there is no FOIA-cognizable public interest in evidence of state governmental misconduct held in FBI files even where there is a nexus between FBI activity and the activity of state agency wrongdoers.

That holding violates the affirmative rule of *Reporters Committee* that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that [*i.e.* FOIA's] statutory purpose." *Id.* at 772. *See also, Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Where, as here, the FBI engaged in coordinated activity with state governmental authorities during the very period of their wrong-doing (60a; Respondent's Supplemental Appendix below at SA5 to SA13) and a record of that activity exists in federal agency files, release of FBI files will shed light on FBI agency conduct by exposing whether or not and to what extent the FBI participated in the state wrong-doing. In this case, the cross-petitioner's FOIA application would have shed light upon the manner in which the FBI conducted itself in a federal/state/local investigative and prosecutive team that, in bad faith, suppressed exculpatory evidence and coerced and impermissibly coached witnesses. See *Landano I* and *II*, *supra*.

The question presented here is of broad institutional importance. There is often a functional nexus between the FBI and state authorities, for example when the FBI and

state authorities work jointly to investigate interstate crime. The public has a right to know whether the FBI has joined state authorities in wrong-doing or passively condoned such activity. In this specific case, the public has an interest in knowing whether state authorities used the FBI as a repository for exculpatory materials they wished to hide.

Certiorari should be granted to decide whether under *Reporters Committee* there is a substantial public interest, for purposes of Exemption 7(C), when a FOIA applicant seeks to explore FBI conduct during coordinated activity with tainted state agencies. If certiorari is not granted, an erroneous Third Circuit ruling, deviating broadly from this Court's decisions, will serve as precedent throughout the nation, because the Third Circuit's ruling is the only published appellate opinion addressing Exemption 7(C) in the context of a federal agency harboring evidence of its relationship to wrong-doing State agencies.

CONCLUSION

For all of the foregoing reasons, the cross-petition for a writ of certiorari with respect to the Exemption 7(C) portion of the Third Circuit's judgment should be granted, whether or not the underlying Petition is granted.

Respectfully submitted,

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DATED: July 22, 1992